

# NORTH DAKOTA DEFENDER

The Newsletter of the North Dakota Commission on Legal Counsel for Indigents

Spring 2010

Thirteenth Edition

## The Commission

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## WHAT'S ON THE HORIZON

by Robin Huseby

The Commission on Legal Counsel for Indigents was formed pursuant to legislation in 2005. Our agency started from scratch in figuring out how to provide services for approximately 10,000 indigent criminal/juvenile cases each and every year. We had to develop a system of appointments. We needed to start fresh with agency standards and policies, and open up what public defender offices our Commission felt were necessary. While much has been done to re-define indigent defense in North Dakota, there is much work ahead.

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One of my concerns for the future is how we should be "counting" case assignments. Let's take a contractor out there who handles 280 cases a year. She may take 100 felonies and 180 misdemeanors. Currently, a Gross Sexual Imposition case (a major felony) is counted as "one" case assignment, the same as one Driving Under Suspension (a class B Misdemeanor). Is that fair? We know, from the data inputted on the case management system, that a Gross Sexual Imposition takes more hours to work on than a Driving Under Suspension, so why are they counted the same? This rudimentary example of an inequity in determining appropriate case loads points to the fact that we should be looking at the possibility of a weighted case load study of some kind. I am a bit tentative about jumping into this project because I have observed the time and money expended by other states who have tackled the issue. There are many states that use weighted case loads to determine an attorney's case load, and some of them spent years analyzing attorney time records. There are different models available and so when tackling this project we will not necessarily have to re-invent the wheel, so to speak. There are issues to resolve before we tackle this project; do we hire a consultant? Do we use one of the tried and true methods? Do we have enough information on our in-house time management system to conduct a thorough study? This project is on our shelf for consideration.

## Upcoming Meetings and Events

June 15-18 - SBAND Annual Meeting  
Ramkota, Bismarck

June 21- Commission Meeting  
Radisson, Bismarck

June 23-24 - Indigent Defense Seminar  
Alerus Center, Grand Forks

June 23 - NDACDL Meeting  
Alerus Center, Grand Forks

July 26-29 - Children's Justice Symposium  
Ramkota, Bismarck

June 23-24, 2011 - Indigent Defense Seminar  
Hilton Garden Inn, Fargo

Another "big-picture" item we constantly tackle is how to recruit new (and not so new) attorneys to handle indigent cases. This situation ebbs and flows; sometimes we will get 2-3 attorneys calling us for cases, and sometimes I can look for months before we find someone to get into the rotation. Recruitment is a huge problem for

us, and believe me, if we ever get into an area where we cannot find indigent counsel for cases, this problem could potentially bring a local or regional court system to halt. We are looking at expanding our use of law school interns to get young attorneys interested in indigent defense. We also are making sure our attorneys who take conflict cases have the right of refusal. That is, if there is a case they feel uncomfortable taking, we can and will re-assign counsel. Lastly, we try to provide adequate support to our conflict and contract counsel by providing the opportunity for training and research. The governing commission, who recognizes the fact that we must recruit and retain available attorneys, has recently voted to raise the hourly rate for indigent attorneys from \$65.00 an hour to \$70.00 an hour contingent on funding by the legislature.

I encourage anyone with ideas as to how to improve our agency, including ideas on recruitment of attorneys, to please contact Jean or me, at 701-845-8632. We value your opinions. Thank you.

## **WHAT DOES THE SIXTH AMENDMENT “RIGHT TO COUNSEL” MEAN?**

The Commission provides attorneys for indigent persons as required by the federal and state constitutions, relevant statutes and rules. When is a person entitled to counsel under the Sixth Amendment to the United States’ Constitution? We are pleased to include this excerpt from the National Right to Counsel Committee’s Report, *Justice Denied - America’s Continuing Neglect of Our Constitutional Right to Counsel*:

### **The Landmark Decisions: *Powell* and *Gideon***

The Sixth Amendment to the United States Constitution states that “in all criminal prosecutions the accused shall enjoy the right to ... have the assistance of counsel for his defense.” By its terms, the Sixth Amendment does not require that counsel be appointed for the accused and, as part of the Bill of Rights which originally was applicable only to the

federal government, it did not apply to the states at all. When adopted in the late 1700’s, it was a rejection of the English practice of denying legal representation to persons charged with felony offenses. In addition, a number of the original states granted persons a right to counsel in their state constitutions, but these provisions were not interpreted to require that counsel be appointed for those unable to afford a lawyer.

Today, the Sixth Amendment provision related to the assistance of counsel means something entirely different due to several of the most famous decisions of the United States Supreme Court. And, as a nation, consistent with the direction charted by the nation’s highest court, we understand the importance of providing lawyers to those unable to afford an attorney because persons who lack legal training cannot adequately represent themselves in criminal and juvenile court proceedings.

The landscape respecting the right to counsel began to change with the Supreme Court’s 1932 decision in *Powell v. Alabama*, in which nine poor black youths were accused of raping two white women. Amidst “an atmosphere of tense, hostile, and excited public sentiment,” the defendants were hurriedly charged and tried by white jurors, convicted, and sentenced to death, except for the youngest defendant who was 12 years old and sentenced to life in prison without the possibility of parole. As required by Alabama law applicable to death penalty cases, two defense lawyers were provided to the defendants, but this did not occur until the morning of trial when there was no opportunity for the attorneys to investigate their clients’ cases or otherwise prepare for trial. The Supreme Court reversed the defendants’ convictions, holding that they “were not accorded the right to counsel in any substantial sense” and that the denial of counsel violated the federal Constitution’s Fourteenth Amendment due process of law clause [applicable to the states](#).

Although the ruling in *Powell* was limited to capital proceedings in state criminal courts, its rationale regarding the need for legal representation has been invoked by the Supreme Court in subsequent decisions and is just as compelling today as when the words were penned more than 75 years ago:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Despite the foregoing rationale of the *Powell* decision, which applies not only to capital cases but to non-capital criminal and juvenile delinquency proceedings as well, legal representation as a matter of constitutional right was not extended beyond capital cases for another 31 years—not until the Supreme Court’s historic decision in *Gideon v. Wainwright*. What happened in *Gideon* illustrates the enormous importance of providing defense lawyers for those who cannot afford to retain their own.

On June 3, 1961, there was a break-in at a pool hall in Panama City, Florida, resulting in the theft of some alcohol and change from a cigarette machine and juke box. Clarence Earl Gideon was charged with a felony under Florida law, i.e., breaking and entering with the intent to commit a misdemeanor. Gideon informed the trial judge that he could not go to trial because he needed a lawyer, and he asked the court to appoint a lawyer for him because he lacked money to hire an attorney. The judge summarily refused the request, and Gideon proceeded to defend himself, claiming that he was innocent. The jury, however, convicted

Gideon, and he was sentenced to five years in prison, the maximum penalty for the offense. Gideon then sought relief from the Florida Supreme Court, arguing that the trial court’s refusal to provide counsel for him violated his rights under the federal constitution, but again his claim was rejected.

With the aid of a prison library, Gideon drafted a five-page petition to the Supreme Court asking that his appeal be considered on constitutional grounds. The Court agreed to hear his case, and assigned Abe Fortas, a prominent Washington, D.C. lawyer from the firm of Arnold, Fortas & Porter to brief and argue Gideon’s appeal.

The unanimous decision of the Supreme Court in *Gideon v. Wainwright*, rendered on March 18, 1963, was written by Justice Hugo Black. Calling it an “obvious truth” that lawyers in criminal cases are “necessities not luxuries,” the Court held, for the first time, that the Sixth Amendment’s effective assistance of counsel provision is a fundamental and essential right made obligatory upon the states by virtue of the Fourteenth Amendment’s due process of law clause.

With customary eloquence, Justice Black further explained:

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

The “obvious truth” to which the Court referred was made apparent when Gideon’s case was sent back to Florida for a new trial. This time Gideon had the “guiding hand of counsel,” as a local attorney was appointed to represent him and in advance of trial

spent several days investigating the case against his client. At trial, the lawyer skillfully exposed the weaknesses in the testimony of the state's witnesses, demonstrating how the state's eyewitness was likely the real culprit. He also called Gideon to the stand, who denied any role in the break-in and provided evidence of his innocence, rebutting testimony that went unchallenged during his first trial. The jury deliberated only an hour and acquitted Gideon of all charges.

Because Gideon was charged with a felony under Florida law punishable by a maximum five-year sentence, *Gideon* has stood for the proposition that the Sixth Amendment right to counsel applies to defendants charged with felonies in state criminal courts. Like the *Powell* opinion on which *Gideon* relied, the Supreme Court's rationale in *Gideon* applies to all criminal and juvenile proceedings, not just felony cases, as the Court's decision was based on a desire to ensure that persons charged in the justice system were treated equally and afforded a fair opportunity to defend themselves.

### **Expansion of the Right to Counsel**

In 1963, in the wake of the *Gideon* decision, numerous questions were unresolved. Foremost among these was whether the right to counsel extended beyond felony cases. For example, did the right to counsel apply in misdemeanor prosecutions and in juvenile delinquency proceedings? Was it necessary to provide defense counsel the services of experts, such as psychiatrists, and other kinds of ancillary assistance? At what stage of a case must counsel be provided? Under what circumstances, if any, may a defendant proceed without an attorney? And, perhaps most important of all, who is responsible for compensating the defense attorneys who would now be required and how should the delivery of defense services be structured?

#### *Types of Cases Requiring Counsel*

The next major expansion of the right to counsel occurred in 1967 with the Supreme Court's *In re Gault* decision, in which the right to counsel was applied to juvenile delinquency proceedings. Citing *Powell* and *Gideon*, the Court held that a child found

to be delinquent and "subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'"

Then, in 1972, in the case of *Argersinger v. Hamlin*, the Sixth Amendment again was invoked, resulting in another significant expansion of the right to counsel. An indigent defendant was charged with the misdemeanor offense of carrying a concealed weapon. Denied legal representation, he was convicted and sentenced to jail. Emphasizing the defendant's loss of liberty and the importance of counsel in achieving fair trials, the Supreme Court reversed. As the Court explained, "absent a knowing and intelligent waiver [of counsel], no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."

In 2002, *Argersinger* was applied to cases in which defendants, without being afforded counsel, receive suspended jail sentences, are placed on probation, and later the probation is revoked and imprisonment imposed. In *Alabama v. Shelton*, the Supreme Court held that "the Sixth Amendment right to appointed counsel, as delineated in *Argersinger*..., applies to a defendant in Shelton's situation. We hold that a suspended sentence that may 'end up in the actual deprivation of a person's liberty,' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution of the crime charged." As the Court explained, when the prison term is activated, incarceration is not for the probation violation but for the underlying suspended offense for which the defendant was never provided [the opportunity to have legal representation](#).

Based upon the Fourteenth Amendment's due process and equal protection clauses, defense counsel for the indigent also has been required in appellate cases. In 1963, in *Douglas v. California*, a companion case to *Gideon* decided the same day, the Supreme Court held that an indigent defendant may not be

discriminated against by virtue of poverty and denied the right to an attorney to assist with the first appeal granted by the state as a matter of right. More recently, in *Halbert v. Michigan*, a case decided in 2005, the Court invoked the rationale of *Douglas*, holding that a state may not deny counsel to a defendant who seeks to appeal following entry of a guilty plea. In *Halbert*, the Court recounted the numerous issues that defendants who plead guilty may raise on appeal in an effort to set aside their guilty pleas, as well as the difficulty of doing so without the aid of an attorney.

This discussion of the expansion of the right to counsel deals with what states must do as a matter of federal constitutional law. However, state courts have interpreted their state constitutions and statutes in ways that have expanded the right to counsel beyond what the Supreme Court has required.

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## Upcoming Training

The 2010 Indigent Defense Summer CLE will be held on June 23-24 at the Alerus Center, in Grand Forks. **Joel Larson** and **Blake Hankey** will speak on the topic of competency to stand trial. **Bruce Quick** and **Mark Friese** will give a criminal case law update. **Lori Conroy** will discuss sex offender registration requirements. She will also refresh our memories about the immigration consequences of criminal convictions. **Linda Catalano** is scheduled to lead a panel discussion about representing clients from diverse cultures. **Monty Mertz** will speak about the use of interpreters. **Gordon Dexheimer** will provide appellate training. **Mark Lanterman** will discuss cybercrime. **Ross Brandborg** is scheduled to speak on eyewitness identification. **Jennifer Thompson-Cannino**, one of the authors of the book, *Picking Cotton*, is our featured speaker.

Ms. Thompson-Cannino was assaulted at knifepoint by a man who broke into her apartment while she slept. She positively identified Ronald Cotton as her rapist. Mr. Cotton insisted she was mistaken, but Ms. Thompson-Cannino's positive identification was the compelling evidence that put him behind bars. After eleven years, Mr. Cotton took a DNA test which proved his innocence. Ms. Thompson-Cannino will be available after the presentation to sign copies of her book.

There will be no fee for public defenders and monthly contractors to attend this training. Additionally, the Commission will pay for lodging for our public defenders, and one night of lodging for monthly contractors who would like to attend the training but live outside the Grand Forks area. A block of rooms has been reserved for the night of June 23, at the Canad Inn. Please contact Tanya Zachrison before May 26, to have your name added to the rooming list.

## More Training

The North Dakota Children's Justice Symposium is scheduled for July 26-29 at the Ramkota in Bismarck. It is sponsored jointly by the Supreme Court's Court Improvement Committee and the Department of Human Services, and is funded through the Court Improvement Training Grant. Tentative topics include Using Data to Improve Practice, Implicit Bias, Child Trauma and Mental Health, Active Efforts, Termination of Parental Rights, The Culture of Poverty, and Interviewing Children.

## Welcome Aboard

**Kim Kadrmas** is the new part-time secretary in the Bismarck-Mandan office. **Brittany Hagar** is the new-part time secretary in the Minot office.

## FEATURED CONTRACTOR

### ... Blake Hankey

This month, our featured contractor is Blake Hankey. Blake is a Fargo native who graduated from the University of Minnesota Duluth on a tennis scholarship. After graduating with a Major in Communications, Mr. Hankey pursued his Juris Doctorate and certification in Criminal Law Studies at Western State University College of Law in Fullerton, California. As a certified law student he worked in the Orange County District Attorney's Office for two years prosecuting a wide range of cases. Upon graduation, he moved to Minneapolis, MN and began his legal career as a document reviewer for Faegre & Benson, and 3M. In 2004, Mr. Hankey joined the Rosenquist & Arnason Law Firm, eventually becoming a partner in 2007.



Blake is an experienced criminal trial attorney. His practice is dedicated to providing legal services to clients facing misdemeanor or felony charges in both the state and federal court systems. He handles the indigent defense conflict contract in Grand Forks County, and also provides indigent defense services in Traill and Steele Counties. Blake thrives on the challenging criminal cases and has generated outstanding results involving conspiracy, drug crimes, robbery and many other serious criminal allegations.

Blake has been the attorney in several high profile and complicated criminal cases. Most recently was the Darin Dahl trial. Mr. Dahl was accused of firing on peace officers – hitting one of them in the helmet during a 23 hour standoff in a home near Luverne, North Dakota.

There is also the lighter side to a criminal practice. During the sentencing hearing for a client, Blake gave a long-winded, yet eloquent, argument stating his client would be unable to do his community service as well as pay his fines and fees because his client was legally blind. Blake provided paperwork from his client's doctor stating the client

was legally blind. Ultimately, the argument was won and the client did not have the burden of paying fines and fees, nor did he have to complete community service hours. After the sentencing hearing, Blake returned to his office, a short three-minute drive from the courthouse. As Blake walks in, he receives a phone call from the Sheriff stating that his "legally blind" client was now in custody for reckless endangerment – his client drove out of the courthouse parking lot after his hearing.

## NOTES ...

Our agency is pleased to announce that Attorney Daniel Borgen from the Grand Forks Public Defender Office and Attorney Eric Baumann from the Minot Public Defender Office will be attending the Western Trial Advocacy Skills Training in Laramie, Wyoming, in June. Robin would like to see two attorneys participate each year, and last year Robert Quick from the Bismarck office, and Nick Thornton, from the Fargo office, attended. Both Rob and Nick indicated the training was extremely relevant and helpful to their trial practice.

The Commission's 2009 Income Guidelines remain in effect until further notice. The Commission's guidelines are based on the federal poverty guidelines, which, pursuant to federal legislative action, have not yet been updated this year. The Commission's Guidelines can be found at [www.nd.gov/indigents/docs/incomeGuidelines2009.pdf](http://www.nd.gov/indigents/docs/incomeGuidelines2009.pdf).

The new North Dakota Rules of Juvenile Procedure became effective on March 1, 2010. They can be found on the Supreme Court website at [www.ndcourts.gov/rules/juvenile/frameset.htm](http://www.ndcourts.gov/rules/juvenile/frameset.htm).

Rule 24 of the North Dakota Rules of Appellate Procedure became effective March 1. Under this new rule, an indigent criminal defendant may file a "statement of additional grounds for review" with the appellate court within 30 days after service of the brief drafted by counsel. The statement must be served on all parties. Additional briefing in



response to the statement and oral argument by the indigent defendant may be permitted by the court.

Rule 8.12 of the Rules of Court was adopted effective March 1. It provides that “[a] parent has a right to counsel during all stages of a proceeding to terminate that parent’s parental rights. If indigent, the parent has a right to have legal counsel provided at public expense. The notice of hearing or summons must advise the parent of these rights and the court must confirm that the notice was given.”

If you have filed a notice of appeal, ordered a transcript, and the matter is assigned to a new attorney, please make sure to inform the court reporter that the case is assigned to another attorney, so he/she knows where to send the transcript. If you have ordered a transcript, or become assigned to a case in which a transcript has been ordered, and the client decides to dismiss the appeal, please don’t forget to let the court reporter know about it, so he/she isn’t working unnecessarily on the transcript.

## **New North Dakota Criminal Defense Organization Formed**

The North Dakota Association of Criminal Defense Lawyers has recently been incorporated. NDACDL’s mission is to promote justice and due process for individuals accused of a crime; foster integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice within the State of North Dakota. Membership includes public defenders, indigent defense contractors, and private criminal defense lawyers in North Dakota. The next NDACDL meeting will immediately follow the Indigent Defense CLE in Grand Forks at the Alerus Center on June 23, 2010, at 5:15 p.m. Dinner will be provided, and all are encouraged to attend. Together, we can have a positive impact on the state of criminal justice in North Dakota for all of our clients. For membership information, contact Paul Myerchin, NDACDL’s Treasurer, at PO Box 995, Bismarck, ND 58502-0995, 701-250-8968 or [clarklaw@btinet.net](mailto:clarklaw@btinet.net).

## **MOVIE REVIEW** *American Violet*

I think most people familiar with the law would enjoy this 2009 movie based upon the true story of Dee Roberts, a young African American single mother who is targeted for prosecution by a racist District Attorney in a small Texas town. Even though she had no drugs and there is no proof of possession (the drug task force used a mentally impaired confidential informant), she is offered the hellish choice of either taking a plea bargain, or sitting in jail for six months leaving the fate of her four small children in limbo. The DA routinely orchestrated raids of project housing units and gained tons of drug convictions this way. Ms. Roberts chose to fight the seemingly impenetrable Texas justice system along with the assistance of the ACLU. I won’t reveal the ending, but it was one of those “you can’t handle the truth” type of moments. We ordered this movie on Netflix.

— Robin Huseby

## **Court-Fever**

I must down to the courts again, to the lonely bench and bar,  
And all I ask is an argument, even if it doesn’t get me far,  
And the state’s appeal if I should win or the court’s denial of my motion,  
And a somber look on the judge’s face, as he wonders at my notion.

I must down to the courts again, for the call of the calendar clerk  
Is a wild call and a clear call that may mean a lot of work;  
And all I ask is a decent offer with some sense of justice,  
And a prosecutor who is not on a mission from God, but who know it is just us.

I must down to the courts again, to the weary defender’s life,  
To the brief’s way and the jury’s say where the verdict’s like a whetted knife;  
And all I ask is a knock-down fight from an able fellow-lawyer  
And quiet drink at the local pub, together when the long trial’s over.

*With a grateful acknowledgment to  
John Masefield, English Poet Laureate,  
Bob Martin, Minot Supervising Attorney*

## **Sites to Check Out**

The Crime and Justice Institute is offering a series of free webinars, on the second Wednesday of each month. Registration information can be found at <http://www.cjinstitute.org/projects/webinars>.

The NDDOCR's Guide to Using Interactive Television at North Dakota DOCR Facilities for Court Hearings can be found at [www.nd.gov/docr/adult/tps/docs/IVNCourhearingprotocol.pdf](http://www.nd.gov/docr/adult/tps/docs/IVNCourhearingprotocol.pdf).

The W. Hayward Burns Institute for Juvenile Justice, Fairness and Equity can be found at <http://www.burnsinstitute.org/>.

Read about Jennifer Thompson-Cannino and Robert Cotton at [www.pickingcottonbook.com/home.html](http://www.pickingcottonbook.com/home.html).

## **Next Commission Meeting**

The next Commission meeting is scheduled for June 21, in Bismarck. If you have any business for the Commission, please contact the Valley City office as soon as possible to get placed on the agenda. We provide notice of the meetings to the Secretary of State's office, and the meetings are open to the public.

ND Commission on Legal Counsel for Indigents  
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